

HR Weekly Podcast

August 12, 2015

Today is Wednesday, August 12, 2015. Welcome to the HR Weekly Podcast from the Division of State Human Resources. This week's podcast deals with the use of intermittent leave under the Family Medical Leave Act, or FMLA.

FMLA allows employers to grant intermittent leave to eligible employees for their own serious health condition or for that of an immediate family member. The law also allows eligible employees to take intermittent FMLA leave to provide care for a child after birth and for the care of a child following the placement for adoption or foster care.

There can be situations, however, when determining whether or not an employee is eligible for intermittent FMLA leave that are not so easy. It is important to always clearly understand the details of an individual's situation prior to making a decision.

While an employer should be diligent in obtaining all relevant information in order to make an accurate decision regarding FMLA eligibility; employers can deny FMLA eligibility when appropriate. For example, in the case of *Brown v. Eastern Maine Medical Center*, a female employee claimed that she had a chronic condition that hindered her ability to arrive at work on time. She was terminated from her employment after multiple incidents of tardiness and refusing to accept an offer of a shift change. She sued her employer claiming that, because her tardiness was caused by a medical condition, each late arrival should have been considered as a period of intermittent FMLA leave. The problem with her argument, however, is that Ms. Brown had never been out of work for medical treatment relative to her condition or missed work due to a flare-up of her condition. Moreover, the only time her condition affected her was when it came time to report to work. The court ruled in favor of the employer, stating that intermittent FMLA leave should be granted for a specific period of time, such as a doctor's appointment or when a medical condition becomes incapacitating.

While intermittent FMLA leave can be disruptive due to the fact that it is often unexpected, there are several ways that employers can manage the impact of FMLA leave on the workplace. Here are some examples to consider:

- It is possible to designate FMLA leave retroactively. For example, if an employee returns to work following a two-week vacation and informs the employer that he was hospitalized for the last week of the trip, the last week can be designated as FMLA leave by the employer within two days of being notified.
- Employees should be encouraged to use their accrued paid leave concurrently with their FMLA leave. Leave due to a workers' compensation injury or a short-term disability should also be counted as FMLA time; however, employees cannot use their sick and annual leave when the employee is receiving wage replacement through a disability benefit plan or through Workers' Compensation.
- Employers may temporarily reassign an employee on intermittent FMLA, as long as the pay and benefits remain the same and the employee is returned to his or her previous job, or an equivalent job, after he or she returns to work. The reassignment must not

adversely affect the employee in terms of length or cost of the employee's commute, or appear as punishment for using FMLA leave.

- Employees are required by the FMLA to consult with their employer and attempt to schedule medical treatments and appointments so that they minimize the negative impact on workplace productivity.
- Employees are not inherently protected from discipline or termination while on FMLA. The burden of proof is on the employer to show that the employee would have been disciplined or terminated *regardless* of the request for, or usage of, FMLA leave. However, it is advised that the employer seek legal counsel prior to taking any action.
- Similarly, an employer may subject an employee who is on FMLA leave to a reduction-in-force or mandatory furlough; as long as the employer can prove that the action would have occurred regardless of the employee's FMLA leave. The employer must be prepared to defend the business necessity of the action, and have an objective plan for how affected employees were identified.
- Finally, employees who are on FMLA leave may be disciplined for misconduct or poor performance. The employer must prove, however, that the discipline was based on factors other than the employee's absence. A number of courts have upheld employers' decisions to terminate employees even when the issues surfaced after the employee went out on leave.

Agencies are urged to use caution and seek legal advice, if necessary, prior to addressing certain aspects of FMLA leave. Additional information regarding the FMLA can be found on the Department of Labor's website at: www.dol.gov

Thank you.